



California Fair Political Practices Commission

November 17, 1987

Honorable Stephen H. Wainwright
Trustee
Merced Union High School District
c/o Pacific Investments
2940 Whitegate Dr.
Merced, CA 95340

Re: Your Request for Advice
Our File No. I-87-259

Dear Mr. Wainwright:

This letter is in response to your request for advice regarding application of the conflict of interest provisions of the Political Reform Act (the "Act")^{1/} to your position as Trustee on the Merced Union High School District. Because of the general nature of your question we treat your request as one for informal assistance.^{2/}

QUESTION

Do your real estate business and real property interests within the school district preclude you from participating in actions regarding increasing school facilities for the district?

CONCLUSION

A conflict of interest under the Act may arise when you participate in a decision of the school board which could

^{1/} Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Administrative Code Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Administrative Code.

^{2/} Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).) Advice provided relates only to future acts; we make no comment as to any past acts of the requestor. (Regulation 18329(b)(8).)

foreseeably have a financial effect on your business, your real property interests or any clients with whom you have done business totalling \$250 or more in the last twelve months.

However, you would have to disqualify yourself only when any such financial effect on your own, or your clients' interest is material, and where the effect on your interests is distinguishable from the impact on the public generally.

The principal issue now facing the school board is the need for increased classroom facilities. In light of your real estate business, and numerous real property interests in the district you should anticipate that a number of proposed solutions to the classroom shortage problem may create a conflict of interest for you. This letter provides you with the basic guidelines to be followed in deciding whether your participation in a decision would violate the conflict-of-interest provisions of the Act, and some examples of how the law should be applied.

FACTS

You are a trustee of the Merced Union High School District. The Board of Trustees is faced with the problems of increasing student population and inadequate facilities. Among the options to be considered in providing additional facilities are pursuing Mello-Roos bond financing, site acquisition, establishing attendance boundaries and Mello-Roos district boundaries, imposition of fees on property owners, excess land disposal and possible changes in the use of existing facilities.

You are a self-employed real estate broker and developer. Your business activities include land acquisition, single and multi-family project development, construction, sales and ownership or management of improved residential properties. You anticipate acquiring additional land within the school district during your tenure on the school board.

ANALYSIS

As a trustee of the Merced Union High School District you are a public official. (Section 82048.) As such, the Act requires that you not participate in any governmental decision in which you have a financial interest. (Section 87100.) An official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official or a member of his immediate family, or on:

(a) Any business entity in which the public official has a direct or indirect investment worth one thousand dollars (\$1,000) or more.

(b) Any real property in which the public official has a direct or indirect interest worth one thousand dollars (\$1,000) or more.

(c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dollars (\$250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

(e) Any donor of, or any intermediary or agent for a donor of, a gift or gifts aggregating two hundred fifty dollars (\$250) or more in value provided to, received by, or promised to the public official within 12 months prior to the time when the decision is made.

Section 87103.

Your real estate business is a business investment and a business entity in which you hold a position of management. Based upon the facts presented in your letter, we will assume that the threshold of \$1,000 in investment interest has been met. Further, we will assume that each of your real property interests within the district has a value of at least \$1,000.

Because you are sole owner of your real estate business, the business and each of its clients are sources of income to you. (Section 82030.) Moreover, if you receive commission income for your services as a real estate broker, Regulation 18704.3(c)(3) (copy enclosed) identifies additional sources of income. If any of these sources of income have provided or promised you \$250 or more in income in the past twelve months they would constitute a potential for a conflict of interest.

You would, therefore, be required to disqualify yourself from participating in decisions of the school board which would foreseeably and materially affect your business or real property interests, or any sources of income to you, in a manner distinguishable from the effect on the public generally.

Foreseeability

The effect of a decision is reasonably foreseeable if there is a substantial likelihood that it will occur. Certainty is not required; however, if the effect is a mere possibility it is not reasonably foreseeable. (In re Thorner (1975) 1 FPPC Ops. 198, copy enclosed.)

Among the foreseeable financial effects of the decisions of the school board are increased expenses or liabilities as a consequence of the imposition of fees, and potential increase or decrease of property values, depending upon actions taken by the school board and the location of activity.

Each of these potential effects could have an impact upon your real estate business and real property interests. It is necessary, however, to determine whether the effect on your financial interests will be material before deciding whether or not you must disqualify yourself from the decisions of the school board.

Materiality

The effect of a decision is considered material if it is "significant." (Regulation 18702 (a), copy enclosed.) The standards for determining whether the effect of a governmental decision on a business entity is material are set forth in Regulation 18702.2 (copy enclosed). The appropriate standard depends on the financial size of the business entity. Since you are the sole owner of the corporation, we will assume that Regulation 18702.2(g), the standard for small business entities, is applicable.^{3/} Under this standard, the effect of a decision will be material if:

(1) the decision will result in an increase or decrease in the gross revenues for a fiscal year of \$10,000 or more; or

(2) the decision will result in the business entity incurring or avoiding additional expenses for a fiscal year in the amount of \$2,500 or more; or

^{3/} You should examine Regulation 18702.2 to verify this assumption. Please contact me for additional advice if you determine that your business comes under a different subsection of the regulation.

(3) the decision will result in an increase or decrease in the value of assets or liabilities of \$10,000 or more.

Regulation 18702.2(g).

Because of the breadth of your involvement in real estate within the district it is not possible for us to evaluate the effect of decisions of the school board on each of the financial interests of your business. It would be your responsibility under the Act to determine, based on the implications of the decisions of the school board, whether there would be a material financial effect on your business interests based on the regulatory guidelines we have provided herein.

The same holds true for your real property interests within the district. The standards for determining whether a governmental decision will have a material financial effect on real property are set forth in Regulation 18702(b)(2). A decision is material if it will increase or decrease:

(A) The income producing potential of the property by the lesser of:

1. One thousand dollars (\$1,000) per month; or
2. Five percent per month if the effect is fifty dollars (\$50) or more per month; or

(B) The fair market value of the property by the lesser of:

1. Ten thousand dollars (\$10,000); or
2. One half of one percent if the effect is one thousand dollars (\$1,000) or more.

Regulation 18702(b)(2).

You would need to determine whether the decisions of the board to acquire property, assess fees, or take any other action would materially affect your real property interests within the district based on the thresholds provided in the regulation.

Finally, before participating in any discussion or decisionmaking by the school board regarding expansion of school facilities, you must consider the financial effect of

these decisions on your various sources of income. You would have to apply the standards set out in Regulations 18702.2 and 18702(b)(2) above, to any business or real property interests of your clients or other sources of commission income, if any, located within the district. If a source of income to you is an individual rather than a business entity, or does not have a real property interest which will be affected by a decision of the school board, you must still determine whether there could be a significant financial effect on that individual. (Regulation 18702.2(b)(3)(D), copy enclosed.)

Public Generally

Even if it is determined that the effect of a decision of the school board would be material, you would be exempt from disqualification if the decision will affect your interests in substantially the same manner as it will affect all members of the public, or a significant segment of the public. (Regulation 18703, copy enclosed.)

The Commission has determined that the "public" consists of the residents and businesses of the jurisdiction of the agency in question. (In re Owen (1976) 2 FPPC Ops. 77, and In re Legan (1985) 9 FPPC Ops. 1, copies enclosed.) Thus, decisions that would affect everyone in the school district, or a significant segment of the population of the district, would affect the public generally.

Regulation 18703 provides further that if a public official is a member of an industry, trade or profession which is predominant in the district, the "significant segment" exception would apply to a material financial effect on that business interest. (Regulation 18703(b).) This provision does not appear to apply to your situation, however. Although there may be a great deal of property development within the district, it is unlikely that the real estate development industry constitutes a significant segment of the public. In order to be considered a significant segment of the public, a group must be large in numbers and heterogeneous in quality. (In re Ferraro (1978) 4 FPPC Ops. 62; In re Legan, (1985) 9 FPPC Ops. 1, copies enclosed.)

Examples

Assume you sold a home within the district two months ago, and the school board is considering imposing an assessment on residents within a particular area of the district that includes that property. Because the people who purchased the home are sources of income to you of more than \$250 within the

past twelve months, there is a possible conflict of interest. However, since this is their only financial interest in the district, and all other residents in the assessment area will be assessed in the same manner, the public generally exception would eliminate the conflict of interest. (See also In re Owen, supra, and In re F. Mackenzie Brown (1978) 4 FPFC Ops. 19, copy enclosed.)

In another example the board has on the agenda the issue of changing the use of existing facilities. Assume that currently a facility is being used for storage purposes, and there is a proposal to utilize the building for increased classrooms. It is possible that property values would decrease because of the increased student traffic immediately adjacent to the facility. On the other hand, property values in the surrounding area could increase because families with children would have an incentive to buy homes close to a school facility.

In either case, if you or a client owned property adjacent to this facility or had some other financial interest, it is foreseeable that the decision of the school board would affect your economic interest. Therefore, if the effect were material you would be required to disqualify yourself from participating in that decision of the school board.

Regulation 18702.1

Finally, because one of the options that may be considered by the board is establishing a Mello-Roos assessment district, it is important that you be aware of Regulation 18702.1 (copy enclosed). This regulation requires disqualification if:

(3) The decision concerns the zoning or rezoning, annexation or deannexation, sale, purchase or lease, actual or permitted use, or inclusion in or exclusion from any city, county, district or other local government subdivision of, or taxes or fees assessed or imposed on, or any similar decision as to real property in which the official has a direct or indirect interest (other than a leasehold interest) of \$1,000 or more;

Regulation 18702.1(a)(3).

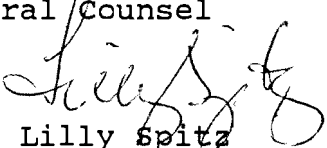
Once again, the public generally exception would apply to this disqualification provision. However, the assessment district would have to encompass a significant portion of the school district for the exception to apply. Your holdings in the district are so vast that it is likely you would be affected differently from the public generally.

Honorable Stephen H. Wainwright
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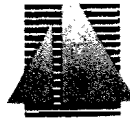
I hope we have provided the tools necessary to allow you to determine when you may be faced with a conflict of interest as a member of the school board. If you have any further questions regarding this matter, please contact me at (916) 322-5901.

Sincerely,

Diane M. Griffiths
General Counsel


By: Lilly Spitz
Counsel, Legal Division

DMG:LS:plh
Enclosures



PACIFIC INVESTMENTS

10/16/87

October 16, 1987

California Fair Political Practices Commission
PO Box 807
Sacramento, CA 95804-0807

Ladies and Gentlemen:

I would request your written advice to me regarding possible conflicts of interest that I may face as a Trustee of the Merced Union High School District. This request is made so that I can avoid any potential conflicts as I represent the community.

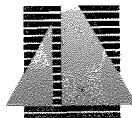
The District's student population has been steadily increasing over the last 10 years and decisions must be made on how best to house these students. The Board has already decided to build a high school or high schools using Mello-Roos bond financing, as state funding is not available. Further decisions should include school site acquisition, school size, attendance boundaries, Mello-Roos district boundaries, imposition of Mello-Roos levies on property owners, excess land disposal and the possibility of changing the use of existing facilities, amongst others.

I am self-employed in residential real estate. My business activities have included land acquisition, single-/multi-family project development, construction, sales and ownership/management of improved residential properties. As an aside, I have not participated in either discussions or votes on imposition of "developer fees". In the normal course of my business, I may acquire more land in the district. This request is for the purpose of providing tangible guidelines as I decide which issues pose potential conflicts and can also serve as guidance to my fellow board members.

The district is deeply involved in land acquisition discussions now, so your earliest response to this request would be appreciated. Thank you.

Very truly yours,

Stephen H. Wainwright



PACIFIC INVESTMENTS

October 16, 1987

California Fair Political Practices Commission
PO Box 807
Sacramento, CA 95804-0807

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I am self-employed in residential real estate. My business activities have included land acquisition, single-/multi-family project development, construction, sales and ownership/management of improved residential properties. As an aside, I have not participated in either discussions or votes on imposition of "developer fees". In the normal course of my business, I may acquire more land in the district. This request is for the purpose of providing tangible guidelines as I decide which issues pose potential conflicts and can also serve as guidance to my fellow board members.

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Very truly yours,

Stephen H. Wainwright



California Fair Political Practices Commission

October 20, 1987

Stephen H. Wainwright
Pacific Investments
2940 Whitegate Drive
Merced, CA 95340

Re: 87-259

Dear Mr. Wainwright:

Your letter requesting advice under the Political Reform Act was received on October 19, 1987 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact Lilly Spitz, an attorney in the Legal Division, directly at (916) 322-5901.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or more information is needed, you should expect a response within 21 working days if your request seeks formal written advice. If more information is needed, the person assigned to prepare a response to your request will contact you shortly to advise you as to information needed. If your request is for informal assistance, we will answer it as quickly as we can. (See Commission Regulation 18329 (2 Cal. Adm. Code Sec. 18329).)

You also should be aware that your letter and our response are public records which may be disclosed to the public upon receipt of a proper request for disclosure.

Very truly yours,

Diane M. Griffiths
Diane M. Griffiths
General Counsel *by Ked*

DMG:plh